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KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

December 27, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B-204
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Application by New York Telephone Company (d/b/a Bell Atlantic - New York), et al., for Authorization To Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295

Dear Ms. Salas:

Enclosed for filing are an original and four copies of Bell Atlantic's Opposition to AT&T's Motion for a Stay Pending Judicial Review. Please note that the declaration attached to the brief contains confidential information.

Thank you for your assistance in this matter. If you have any questions, please call me at 202-326-7945.

Very truly yours,

Henk Brands

Encs.

No. of Copies rec'd 014
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REDACTED -- FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by New York Telephone	)	
Company (d/b/a Bell Atlantic -	)	
New York), Bell Atlantic	)	CC Docket No. 99-295
Communications, Inc., NYNEX Long	)	
Distance Company, and Bell Atlantic	)	
Global Networks, Inc., for	)	
Authorization To Provide In-Region,	)	
InterLATA Services in New York	)	

**BELL ATLANTIC'S OPPOSITION TO
AT&T'S MOTION FOR A STAY PENDING JUDICIAL REVIEW**

The Commission should reject AT&T's last desperate attempt to fence out a long distance competitor in New York: it should deny AT&T's request for a stay of this Commission's order approving Bell Atlantic's Application for long distance relief in that State.

Despite AT&T's dark pronouncements in the press of its intent to sue, AT&T's motion merely reinforces the strength of the Commission's Order. For, like the Grinch it appears to emulate, when faced with the Commission's comprehensive and well-reasoned Order, AT&T's heart quite obviously is not in it. On its face, AT&T is merely going through the motions of one last stand to try to forestall the inevitable competition it has tenaciously fought to block by every possible means. AT&T's motion does not and cannot identify any reversible error committed by the Commission. Instead, it simply recycles from AT&T's previous submissions four intensely factual claims, without in any meaningful way addressing the Commission's reasoning in rejecting those very claims. AT&T therefore could not possibly show any likelihood of success on appeal.

Even disregarding the utter lack of any likelihood of success on the merits, AT&T still could not be entitled to a stay. The simple fact is that whatever supposed "harm" AT&T might suffer from the introduction of a new competitor pales in comparison to the very real harm that Bell Atlantic and the public would suffer if a stay were granted. *First*, having opened its local markets, Bell Atlantic is now losing customers in droves -- many to AT&T, which, like the other major long distance incumbents, already has launched a mass-market bundled service offering that includes both local and long distance. A stay would preclude Bell Atlantic from competing on the same basis, despite the fact that it demonstrably has earned the right to do so. *Second*, the Commission has already correctly determined that Bell Atlantic's immediate entry into New York's long distance markets promotes the public interest. Indeed, Bell Atlantic is poised to bring lower long distance rates to New York consumers -- particularly the mass-market customers who have been short-changed by AT&T and the other big long distance incumbents.

Accordingly, AT&T can show neither that it is likely to prevail on the merits nor that the balance of the equities tips in its favor. AT&T's motion should therefore be denied.

ARGUMENT

In considering whether a stay pending appeal is appropriate, this Commission uses the familiar test of *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), under which it evaluates four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Station KDEW(AM)*, Memorandum Opinion and Order, 11 FCC Rcd 13683, ¶ 6 (1996). "A petitioner must satisfy each of these four tests in order for the Commission to grant a stay." *Petition of the Connecticut Department Public Utility*

Control, Order, 11 FCC Rcd 848, ¶ 14 (1995). With respect to each of the four factors, the movant "must make a convincing showing." *Implementation of Section 309(j) of the Communications Act*, Order, Gen. Docket No. 90-264, FCC 99-157, 1999 WL 446589, ¶ 9 (rel. July 2, 1999). AT&T has made no showing at all -- much less a convincing showing.

I. IT IS INCONCEIVABLE THAT THE ORDER WILL BE REVERSED ON APPEAL.

AT&T enumerates four reasons why the Order is likely to be reversed on appeal. Each of AT&T's four claims (relating to hot cuts, OSS, pricing, and DSL) is simply a rehash of arguments AT&T previously made in comments or other filings. The Commission carefully considered those arguments and rejected them in a well-reasoned order spanning more than 200 pages. And this Commission has previously made clear that a party seeking a stay cannot establish a likelihood of success on the merits by relying "principally on arguments already considered [and rejected] by the Commission." *Id.* ¶ 15. That rule alone bars any finding of likely success here.

Even disregarding that rule, however, AT&T's claims still fail. AT&T appears to take issue only with findings of fact, with the application of undisputed principles of law to the facts that the Commission found, or with the interpretation of ambiguous statutory terms. AT&T's challenges (each of which is meritless and could not survive even *de novo* review) must therefore overcome extensive deference on appeal.[1] That deference will be particularly broad here, where the Commission's many hundreds of factual and other determinations are based upon a vast

[1] *See, e.g.*, *BellSouth Corp. v. FCC*, 162 F.3d 678, 693 (D.C. Cir. 1998) (Commission's interpretation of ambiguous terms in Section 271 subject to *Chevron* deference); *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 142 (2d Cir. 1998) ("[w]e review the FCC's interpretation *and application* of the statute under the standard articulated in *Chevron*") (emphasis added); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999) (fact finding in informal adjudication subject to

record, consisting of two-and-a-half years' worth of state commission proceedings, the comments of 57 parties, and the Commission's own exhaustive investigation. AT&T therefore could not possibly show a likelihood of success on the merits.[2]

A. AT&T's Hot-Cut-Related Claims Are Meritless.

With respect to hot cuts, the Commission determined that, "[b]ecause there is no retail equivalent to a hot cut," Order ¶ 291, Bell Atlantic satisfied its statutory responsibilities if it provided competitors with a "meaningful opportunity to compete," *id.* AT&T does not quarrel with that conclusion, instead merely repeating three meritless and factbound arguments.

First, AT&T argues that "Bell Atlantic provisioning errors continue to put a significant number of AT&T customers out of service during [a] hot cut." Motion at 6. Just as it did before the Order issued, AT&T points to "evidence" that 12 percent of its customers lose service during hot cuts. *See id.* But AT&T does not (because it cannot) seriously rely on this "evidence." The Commission found that the New York PSC's "comprehensive reconciliation of AT&T's outage data . . . largely refutes AT&T's allegations," Order ¶ 302, and found that "less than 5 percent" of Bell Atlantic's hot cuts caused service outages, *id.*[3]

"arbitrary and capricious" review, which is satisfied where finding "is supported by substantial evidence").

[2] This is particularly true because AT&T is simply wrong in its assumption that, if the Commission had found any flaw in Bell Atlantic's performance on any aspect of any checklist item, no matter how insignificant, it would have denied the Application. *See, e.g.*, Order ¶ 5 ("we consider the overall picture presented by the record, rather than focusing on any one aspect of performance"); *id.* ¶ 60 ("an apparent disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist").

[3] In a footnote, AT&T asserts that the Commission "failed to consider evidence from AT&T showing a higher outage figure [than the 4 to 6 percent outage figure found by the New York PSC]." Motion at 7 n.9. In fact, the Commission extensively considered AT&T's evidence, but rejected it as unpersuasive (just as the New York PSC had rejected it earlier). *See, e.g.*, Order ¶¶ 301-302.

AT&T's real claim appears to be simply that the Commission erred in determining that an applicant with a five-percent outage score can still be checklist compliant. *See* Motion at 7; *see also id.* at 7 n.9. This is precisely the kind of line-drawing on which the Commission is entitled to maximum deference.[4] And the Commission's conclusion is eminently reasonable: the Commission noted that "the Department of Justice did not raise the issue of service disruptions in its evaluation," Order ¶ 302 n.963, and that its conclusion was bolstered by "the extremely low rates of installation troubles reported on the hot cut loops provisioned by Bell Atlantic," *id.* ¶ 302. There is no basis for a court to reverse the Commission's judgment on this point.[5]

Second, AT&T complains of Bell Atlantic's on-time performance of hot cuts. *See* Motion at 7-8. But the Commission determined that Bell Atlantic's performance was roughly 90 percent on time in July and August. *See* Order ¶ 296. The Commission then reached "the independent judgment that on-time hot cut performance at a level of 90 percent or greater is sufficient to permit carriers to enter and compete in a meaningful way in the New York local exchange market." *Id.* ¶ 298. That finding is eminently reasonable, especially given that "on-time" in this instance means that the hot cut was completed within an extremely narrow appointment window (typically only one hour). And, again, that finding is precisely the kind of line-drawing that a court is particularly unlikely to overturn.[6]

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[4] *See, e.g., Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (internal quotation marks omitted) ("We are generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.").

[5] AT&T also asserts that it submitted evidence that hot-cut-related service outages sometimes last as long as two days. *See* Motion at 7 (first full paragraph). Suffice it to say that the Commission correctly found that AT&T was largely itself to blame: "in many cases of service disruptions, 'AT&T took longer to identify and report the problem to Bell Atlantic than Bell Atlantic took to fix it.'" Order ¶ 303.

[6] In a footnote, AT&T suggests that the Commission "ignore[d] evidence presented by DOJ, AT&T, and others showing that the 90% on-time figure for July, and by analogy the on-

Finally, AT&T asserts that, when it performs a hot cut, Bell Atlantic drops the customer's directory listing from the appropriate data base in as many as 15 percent of all cases. *See* Motion at 8. The Commission carefully considered that claim. It noted that Bell Atlantic had shown "that AT&T's studies are flawed and do not properly reflect improvements Bell Atlantic has made to its systems," Order ¶ 355 -- improvements that include comprehensive safeguards to catch and correct dropped listings, and all of which supplement the systems that allow other carriers to check the listings themselves. The Commission correctly concluded that the record "sufficiently rebuts AT&T's claims." *Id.* ¶ 356. Moreover, the Commission noted that "[n]o other commenter raises this objection, suggesting the difficulty is of limited competitive consequence." *Id.* ¶ 355. It is simply implausible that any court would disagree with these determinations.[7]

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time figures for August and September, were overstated." Motion at 8 n.10. The Commission plainly did not "ignore" such evidence -- it expressly rejected it. The Commission agreed with the New York PSC's determination that most of AT&T's evidence was unreliable. *See* Order ¶ 295. It also refused to credit other carriers' assertions because they were "conclusory and anecdotal" and not "included in a sworn affidavit." *Id.* AT&T's unexplained suggestion that a court would second-guess this fact finding -- which was based on the Commission's "assessment of the probative value of [conflicting] pieces of evidence," *id.* ¶ 296 -- is laughable.

[7] In a footnote, AT&T suggests (without citing the Order) that the Commission mistakenly "dismisse[d] AT&T's concern regarding dropped directory listings by stating that AT&T presented no evidence of the effect of the dropped directory listing on the directory listing itself." Motion at 8 n.11. AT&T is confused. It is apparently referring to the following sentence in the Order: "Although AT&T claims that Bell Atlantic's OSS consistently drop directory listing orders associated with UNE loop orders, AT&T provides no evidence of problems with the white pages directory listings themselves as a result." Order ¶ 361 (footnote omitted). But that sentence contains the Commission's reasoning with respect to AT&T's dropped-listings point only to the extent it relates to the annual publication of *white pages* listings in book form -- not the Commission's reasoning (contained in Order ¶¶ 354-356) relating to the directory listings database used for directory assistance.

In any event, the "evidence" to which AT&T points is not evidence at all: the affidavit paragraph AT&T cites simply speculates that "[t]he impact [of dropped listings] can be particularly severe if a customer is dropped from the directory listing database at the time the white pages goes to press and the customer is not included in the printed directory." Callahan/Connolly Aff. ¶ 31. As the Commission correctly observed (*see* Order ¶ 361), the

B. AT&T's OSS-Related Claims Are Meritless.

The mishmash of AT&T's OSS-related claims (Motion at 8-12) follows the familiar pattern of repeating arguments made in AT&T's prior filings. To the extent AT&T acknowledges the Order's reasoning at all, it does so only in connection with two items: (1) the Commission's discussion of rejection rates; and (2) the Commission's determination that, in the unique circumstances present here, flow-through rates are competitively less significant than they might be under other circumstances. *See id.* at 11-12. Neither of AT&T's claims is well founded.

First, the Commission determined that high *average* rejection rates were more likely attributable to CLECs than to Bell Atlantic. *See* Order ¶ 166. This was so, the Commission found, because rejection rates varied markedly for individual CLECs, *see id.* ¶¶ 166-67, 175, 181; because Bell Atlantic had provided CLECs with "timely and up-to-date [information on] business rules," *id.* ¶ 167; *see also* ¶ 170; and because the KPMG test established that, when CLECs submit orders correctly, "Bell Atlantic's systems are capable of achieving high rates of order flow-through," *id.* ¶¶ 168, 181. The Commission concluded that high rejection rates therefore "can be properly attributed to competing carriers that, for example, choose not to integrate their interfaces, do not adequately train and manage their employees, or do not invest in the necessary systems." *Id.* ¶ 167; *see also id.* ¶ 181 n.571.

In the face of these detailed and considered findings, AT&T's only specific complaint is that "the Commission does not dispute DOJ's observation that rejections may be attributable to a variety of causes, some of which may be attributable to Bell Atlantic." Motion at 11. In making this claim, AT&T chooses simply to ignore paragraph 175 of the Order, which expressly

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affidavit nowhere actually says that dropped white pages listings have ever caused any problem

addresses DOJ's suggestion "that some of the rejections may occur for reasons within Bell Atlantic's control." Order ¶ 175. The Commission explained that, whereas the DOJ said it was agnostic as to the cause of these rejections, the Commission itself had ample evidence before it (as discussed above) that "strongly implie[d] that the care a competing carrier takes in submitting its orders makes a significant difference in the rate at which its orders are rejected." *Id.*

Second, AT&T implies that the Commission unlawfully departed from previous pronouncements with respect to the significance of flow-through rates. *See* Motion at 11. In fact, the Commission explained: "To the extent that [the Commission's] prior statements could be read to suggest that flow-through rates standing alone are a conclusive measure of nondiscriminatory access to ordering functions, we now clarify that when presented with circumstances like those in the instant record it is unnecessary to focus on order flow-through rates to the same degree we have in past orders." Order ¶ 161. The Commission explained that it had previously used flow-through rates as a proxy -- "a tool used to indicate a wide range of possible deficiencies in a BOC's OSS." *Id.* ¶ 162. Here, by contrast, rather than rely on a mere proxy, the Commission was presented with a comprehensive record demonstrating that Bell Atlantic's systems have been subjected to exhaustive third-party testing, and already are successfully processing large and constantly increasing commercial volumes of real-world orders. In both these respects, Bell Atlantic's Application differed fundamentally from anything that came before.

Because of these differences, and because "none of the specific deficiencies that we have previously associated with low flow-through rates is present in Bell Atlantic's systems," the Commission concluded, "in this application flow-through has significantly less value as an

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in the real world.

indicator of deficiencies of Bell Atlantic's OSS." *Id.* ¶ 163; *see also id.* ¶¶ 177, 179. The Commission concluded that, "in light of the facts and circumstances of this application, . . . Bell Atlantic's overall ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its systems is more relevant and probative for analyzing Bell Atlantic's ability to provide access to its ordering functions than a simple flow-through analysis." *Id.* ¶ 163; *see also id.* ¶¶ 177, 179.[8]

AT&T's suggestion that the Commission unlawfully abandoned precedent is thus plainly mistaken. The Commission's previous orders never laid down a hard-and-fast rule requiring specific flow-through rates. Rather, the Commission used flow through merely as a proxy for OSS-related problems that might actually impair a CLEC's ability to compete.[9] Accordingly, the Order simply does not diverge from precedent, but merely assigns different weight to one of many factors that the Commission considers based on the facts of this particular case. Even if

[8] While this determination is unquestionably correct, the record here also demonstrated conclusively that the flow-through capabilities of Bell Atlantic's systems vastly exceeded those at issue in prior applications. *See, e.g.*, Order ¶¶ 166-168 & nn. 514, 516; Dowell/Canny Rep. Decl. ¶ 43; Miller/Jordan/Zanfini Rep. Decl. ¶¶ 27-36 & Att. D. In addition to the fact that Bell Atlantic's reported flow-through rates are significantly higher when calculated in the same manner as in prior applications, third-party testing demonstrated that properly completed orders that are supposed to flow though do so, and actual commercial experience demonstrated that individual carriers can achieve flow-through rates significantly above the average -- especially for the mass market platform orders that have been the principal focus of concern. *See, e.g., id.*; *see also* Application at 41-42; Bell Atlantic Reply Comments at 15-18; Bell Atlantic November 19 *Ex Parte* Letter; Bell Atlantic December 6 *Ex Parte* Letter. In fact, individual carriers have achieved flow-through rates for platform orders in excess of 70 or even 80 percent. *See, e.g.*, Order ¶ 166; Miller/Jordan/Zanfini Rep. Decl. ¶ 32 & Att. D; Bell Atlantic November 19 *Ex Parte* Letter; Bell Atlantic December 6 *Ex Parte* Letter. Ironically, AT&T's are some of the highest. *See id.*

[9] *See, e.g., Louisiana II Order* ¶ 107 ("Although the Commission has not required a demonstration of order flow-through in its previous decisions under section 271, the Commission has found a direct correlation between the evidence of order flow-through and the BOC's ability to provide competing carriers with nondiscriminatory access to the BOC's OSS functions."); *Michigan Order* ¶ 180 ("there appears to be a direct correlation between manual processing and the time it takes Ameritech to process and provision orders").

the Commission had diverged from prior precedent, however, that is hardly grounds for reversal. Whenever a rule is announced in informal adjudication, it may be "reconsidered and revised in the context of the next adjudication," *Association of Data Processing Serv. Orgs., Inc. v. Board of Governors*, 745 F.2d 677, 685 (D.C. Cir. 1984), so long as the change is properly explained, *see Telephone & Data Sys. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994). AT&T does not -- and cannot -- argue that the Commission's explanation here (which focused closely on the specific facts at hand) was deficient.

C. AT&T's Pricing-Related Claims Are Meritless.

Next, AT&T repeats two facially meritless pricing-related arguments that it (alone among 57 parties) raised in its comments. Both AT&T claims accuse the Commission of unlawfully accepting New York PSC determinations. The Commission stated, however, that it will overrule state commissions' pricing determinations only "if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." Order ¶ 244.[10] While the articulation of this (plainly correct) standard is itself subject to deference, the *application* of that principle is subject to a second measure of deference. *See supra*, pp. 3-4, n.1. In the face of this extra level of deference, both of AT&T's arguments must fail. And the fact that AT&T made a conscious choice not to avail itself of the remedy that is

[10] AT&T suggests that the statute requires that, in the course of a Section 271 determination, the Commission conduct an "independent analysis" of pricing issues. Motion at 12-13. But, as more fully explained in Bell Atlantic's Reply Comments (at 51-53), the statute not only *permits* but also *requires* deferential review of state commissions' pricing determinations. This is so for the simple reason that Congress assigned the task of setting specific prices (applying a general pricing methodology established by this Commission) to the States, subject to federal district court review.

available to it under the Act demonstrates that even AT&T does not believe its own half-baked claims.[11]

First, AT&T again argues that Bell Atlantic's loop rates are improperly based on the assumption that all feeder plant is composed exclusively of fiber, which, AT&T claims, is more expensive than copper where loops shorter than 9000 feet are involved. *See* Motion at 13-15. But, as this Commission noted, the New York PSC found that "the higher cost of fiber feeder was 'more than offset' by the lower provisioning and maintenance costs of fiber"; that "the economics of copper versus fiber depend 'not only on loop length but on capacity'"; and that "New York's population per square mile supports 'the economies afforded by fiber's greater capacity . . . even where distances are short.'" Order ¶ 248. This Commission further determined that "AT&T has not presented sufficient evidence to prove that the New York Commission erred in its determination or that it neglected to consider any relevant facts relating to fiber feeder." *Id.* ¶ 249. Nothing in AT&T's motion explains why that determination is in any respect mistaken.[12]

Second, AT&T repeats its argument that, because the New York PSC relied on a cost study that failed to reflect the full extent of switch discounts, rates for switching elements are too high. *See* Motion at 15-16. But, as this Commission determined, the New York PSC's

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[11] *See* 47 U.S.C. § 252(e)(6); *see also* Concurring Statement of Comm'r Furchtgott-Roth at 7.

[12] AT&T's sole argument to that effect appears to be that, even if the New York PSC's conclusions hold true in the New York City metropolitan area, they do not hold true in rural and suburban areas. *See* Motion at 15. But, even if there were anything to AT&T's 9000-feet argument, loop rates would be too high *only* in areas where feeder runs are below 9000 feet (as in the New York City metropolitan area). In rural and suburban areas, feeder runs are almost always longer than that. *See, e.g.*, Cases 95-C-0657, *et al.*, PSC, *Notice Inviting Comments on Staff Report*, at 37-38, July 15, 1998 (average loop lengths in New York are more than 14,000 feet in suburban areas and more than 15,000 feet in rural areas). Even if AT&T's argument were

"determination of allowable switch costs was the result of a complex analysis that does not lend itself to simple arithmetic correction through the adjustment of a single input." Order ¶ 245. Moreover, the Commission found that "AT&T . . . presented no evidence that the New York Commission's 'ongoing examination of the [switch discount] issue betokens a failure to set TELRIC-compliant rates.'" *Id.* ¶ 247. Nothing in AT&T's motion in any way proves the Commission wrong.[13]

D. AT&T's DSL-Related Claims Are Meritless.

Finally, AT&T (without so much as mentioning the Order) simply repeats its claims that Bell Atlantic "does not provide nondiscriminatory access to pre-ordering information that is required to determine whether loops in Bell Atlantic's network are capable of being used to provide advanced services," Motion at 17, and that "Bell Atlantic failed to demonstrate that its 'performance in provisioning DSL loops' is at 'an acceptable level,'" *id.* at 18. The simple answer is that the Commission correctly rejected each of these claims on factual grounds.

As for pre-ordering information, the Commission specifically rejected "claims that the mechanized process is discriminatory because, in populating the database, Bell Atlantic filtered its back office information in such a manner that it is useful only for Bell Atlantic's particular advanced services offering." Order ¶ 143. In reality, the record here shows that the database includes information (such as loop lengths) that is useful *only* to competing carriers and is not used to provide Bell Atlantic's own DSL service. *See* Bell Atlantic Reply Comments at 14-15. The record also shows that Bell Atlantic provides additional loop information (over and above

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correct (which it is not), therefore, applying an all-fiber assumption in rural and suburban areas would not result in inflated loop rates.

[13] In any event, AT&T could not possibly show irreparable injury on this issue. The switch rates about which AT&T complains are still subject to consideration by the New York

what is included in the database) to competing carriers even though it does not provide that information to its own retail operations. *See* Lacouture/Troy Rep. Decl. ¶ 102; *see also* Order ¶ 143 n.434. Based on the extensive record here, the Commission expressly found that "competing carriers have access to the same underlying information that Bell Atlantic used to populate the mechanized loop qualification database." *Id.* ¶ 143. Nothing in AT&T's motion explains how the Commission acted arbitrarily in this respect.

As for DSL loop provisioning, the Commission noted that Bell Atlantic submitted performance data "demonstrat[ing] that it provisions quality premium digital loops and xDSL-specific loops in a timely manner," *id.* ¶ 323, and that, although "[o]pponents of the application . . . contest much of that data," *id.*, "[t]he absence of a New York performance benchmark or [New York PSC] reconciliation of conflicting data claims makes it difficult for this Commission to decide between the competing statistics," *id.* ¶ 326. The Commission further noted that "competitors have been ordering xDSL-capable loops in New York for a relatively short period of time; there has been a recent surge in demand; and xDSL-capable loops remain a small percentage of loop orders." *Id.* ¶ 327. "In light of these unique circumstances," the Commission concluded, "we should rely upon Bell Atlantic's overall showing of loop performance in evaluating whether Bell Atlantic has met its burden of demonstrating that it provides unbundled local loops in accordance with checklist item 4." *Id.*; *see also id.* ¶¶ 322, 330, 336. Nothing in AT&T's motion explains why this determination would not readily survive review.

PSC. *See* Order ¶ 247. If AT&T prevails, it will be entitled to refunds. *See* Bell Atlantic Reply Comments at 54 & n.69.

II. BOTH THE PRIVATE EQUITIES AND THE PUBLIC INTEREST MILITATE STRONGLY AGAINST A STAY.

Even if AT&T had succeeded in showing a likelihood of success on the merits, it would still not be entitled to a stay.

A. The Private Equities Militate Strongly Against a Stay.

AT&T claims that Bell Atlantic's entry will cause it to lose customers, thereby, presumably, causing it to forgo profits that it will be unable to recoup in the unlikely event that it were to prevail on appeal. *See* Motion at 18-19. But "[a] party moving for a stay is required to demonstrate that the injury claimed is both certain and great." *CUOMO v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (internal quotation marks omitted); *see also Expanded Interconnection with Local Tel. Co. Facilities*, Order, 8 FCC Rcd 123, ¶ 8 (1992). "The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977). AT&T cannot possibly make the showing required under these standards.

It is true that Bell Atlantic is about to begin marketing long distance service in New York, initiating service for residential customers (who account for approximately 30 percent of the New York market) on January 5 and introducing business services approximately 30 to 90 days thereafter. *See* Babbio Decl. ¶ 10. It is also true that Bell Atlantic fully intends to compete for and to win as many customers from AT&T (and other competitors) as it can. *See id* ¶ 9.[14] But AT&T already is (and has been for some time) subject to competition from carriers other than Bell Atlantic that are aggressively marketing bundled packages of local and long distance service. *See id.* ¶ 7. If AT&T's argument is that *any* additional competitor would take business

[14] In the scheme of things, AT&T's harm will of course be minimal: selling service to New Yorkers is only a miniscule part of AT&T's overall business. *See* Babbio Decl. ¶¶ 9-12.

away from it, it will suffer that injury regardless of Bell Atlantic's entry: other entrants can "injure" AT&T this way just as well as Bell Atlantic. If AT&T's argument is, on the other hand, that Bell Atlantic will have a special, unlawful advantage because it has not satisfied the competitive checklist, then AT&T's argument "is inextricably linked with the merits of the case." *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998). Because this Commission has now found that "the local market is open," Order ¶ 428, AT&T cannot show risk of irreparable injury -- for the same reasons that it cannot show a likelihood of success on the merits.

Oddly, one of the variations on AT&T's harm theme is that, once Bell Atlantic is able to sell a bundle of local and long distance service, AT&T will be competitively forced to reciprocate by selling a bundle containing substandard local service, thereby injuring its reputation for quality service. *See* Motion at 19. But AT&T already *is* offering a mass-market bundle of local and long distance service. AT&T has publicly stated that it added 50,000 lines in November alone, anticipates adding as many as 65,000 to 100,000 lines per month by January, and expects to win a 12 percent local market share by the end of the year 2000. *See* Babbio Decl. ¶¶ 3-5. Indeed, AT&T has told Wall Street analysts that Bell Atlantic's current level of wholesale service is adequate to support AT&T's plans. *See id.* ¶ 6. And, quite apart from these obvious factual flaws, AT&T's claim again assumes that Bell Atlantic has failed to satisfy the checklist -- contrary to this Commission's considered findings.

While AT&T's showing of harm is thus speculative and insubstantial, it is a *certainty* that Bell Atlantic will suffer serious harm if a stay is granted. AT&T and other long distance incumbents already can and do provide a bundle of local and long distance service, including to the mass market. *See* Babbio Decl. ¶¶ 3-8. And, while AT&T chose to introduce its own mass-

market offering only recently (when the record here made it clear that Bell Atlantic was on the verge of obtaining long distance relief), at least one other major long distance incumbent rolled out its own mass-market offering nearly a year ago. *See id.* ¶ 7. As a result, Bell Atlantic now faces exploding losses of customers in New York to carriers selling bundled services. *See id.* ¶ 2. If a stay were granted, Bell Atlantic would remain unable to provide consumers a full bundle of services, and would therefore be unable to compete on the same basis as AT&T and the numerous other competitors that already are doing so. AT&T's supposed "harm" therefore pales in comparison to the very real harm Bell Atlantic would incur if a stay were granted. Even if AT&T's flawed claims were to be credited, the absolute best it could hope to show is that the "balance of harms results roughly in a draw." *Serono*, 158 F.3d at 1326. Either way, a stay is inappropriate.

AT&T's only response is that, because Bell Atlantic has been barred from long distance markets since 1984, a few additional months will not matter much. *See* Motion at 20. But that line of reasoning is never grounds for postponing overdue reforms,[15] and it certainly is not grounds for postponing 271 relief. Bell Atlantic now "has opened the door for local entry through full checklist compliance." Order ¶ 427. Congress recognized that, once a BOC has opened its local markets in reliance on the bargain set forth in Section 271, it must be allowed to enter long distance markets *immediately* or it will face an unfair fight. That is why Congress imposed a 90-day deadline on this Commission's decision-making and a 10-day deadline on

[15] *See, e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, Order, 12 FCC Rcd 10175, ¶ 27 (1997) (denying stay because, "[i]n a case such as this one, which involves significant and much needed reforms of access charge and price caps regulation, the burden of showing equitable entitlement to a stay is particularly heavy because of the strong public interest in implementing those reforms"); *Expanded Interconnection with Local Tel. Co. Facilities*,

Federal Register publication. *See* 47 U.S.C. § 271(d)(3), (5). In light of this clear congressional directive for prompt action, a stay would be entirely inappropriate.[16]

B. The Public Interest Militates Strongly Against a Stay.

Even more important than the balance of private equities is the public interest. "In litigation involving the administration of regulatory statutes designed to promote the public interest, [the public interest] factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers*, 259 F.2d at 925. The statute here at issue *is* a statute "designed to promote the public interest": it states that, before granting an application, the Commission must determine that "the requested authorization is consistent with the public interest." 47 U.S.C. § 271(d)(3)(C). The Commission made just such a determination here. *See* Order ¶ 422 ("approval of this application is consistent with the public interest"). Because the statute makes approval effective virtually immediately, *see* 47 U.S.C. § 271(d)(5), the Commission has in effect already determined that further delay is not in the public interest.

Order, 8 FCC Rcd 123, ¶ 9 (1992) (denying stay because it "would thwart [an] important public policy objective").

[16] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 12 FCC Rcd 21872, ¶ 12 (Chief, CCB 1997) (denying stay pending appeal because, where "Congress [has set] an expedited deadline for Commission action," "the public interest is best served by the immediate implementation of the Commission's compensation rules"); *see also Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1308 (1976) (Rehnquist, Circuit Justice) (vacating stay to avoid "imped[ing] Congress' intention to promote improved highway safety as expeditiously as is practicable"); *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987) (Easterbrook, J.) (denying stay because "we must take into account Congress' decision to expedite" implementation of statute); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (finding "good cause" for immediate effectiveness of rule where "the Commission was under a congressional deadline to act quickly"); *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984) (same where "both Congress and the President articulated a profound sense of 'urgency' in the need for implementation of the legislation").

In particular, "additional competition in [long distance] markets will enhance the public interest," Order ¶ 428: consumers will derive vast benefit from the increased long distance competition that Bell Atlantic's entry will bring. Bell Atlantic is poised to begin marketing long distance service in New York at rates that are sharply lower than those of AT&T and the other long distance incumbents, with mass-market residential customers among the principal beneficiaries of these lower rates. *See* Babbio Decl. ¶¶ 14-20. If the Order were stayed, any consumer welfare gain would disappear for as long as the stay is in place. And, as usual, low-volume long distance users would be hurt the most: those users are now paying the highest rates to incumbents like AT&T, and would therefore stand to gain the most from Bell Atlantic's entry. *See id.* ¶¶ 18-20.

AT&T's only argument to the contrary (*see* Motion at 20) is based on this Commission's *Qwest* decision. *See AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998). There, the Commission issued an order enjoining Ameritech from marketing Qwest's long distance service without first obtaining 271 approval. On *that* set of facts, the Commission saw a risk "that the local and long distance markets will be changed in ways that Congress did *not* intend." *Id.* ¶ 28 (emphasis added). Here, by contrast, local and long distance markets are about to be changed in just the way Congress *did* intend: a BOC will be permitted to provide long distance service after this Commission found that it fully opened its local markets.[17] And Bell Atlantic is poised to deliver precisely the kind of benefits that Congress expected from introducing a strong new competitor to take on the Big Three long distance incumbents. *See*

[17] *See Telmex/Sprint Communications, L.L.C.*, Order, 13 FCC Rcd 15678, ¶ 8 (Chief, Int'l Bur. 1998) (distinguishing *Qwest* on the ground that "Ameritech's actions, which the Commission stayed, had not been previously authorized by the Commission so the Commission had never addressed the question raised by AT&T of whether Ameritech's actions violated the Telecommunications Act of 1996").

Babbio Decl. ¶¶ 14-20. The *Qwest* decision is simply inapplicable to a BOC that has received Section 271 approval.

CONCLUSION

For the reasons set forth above, the Commission should deny AT&T's motion for stay pending judicial review.

Respectfully submitted,

Michael E. Glover/hjb

Michael E. Glover
Leslie A. Vial
Edward Shakin
Karen Zacharia
Donna M. Epps
Bell Atlantic
1320 North Courthouse Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-2944

Of Counsel:
James R. Young
Edward D. Young, III

Mark L. Evans
Henk Brands
Evan T. Leo
Scott K. Attaway
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

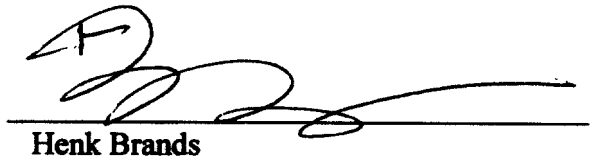
Randal S. Milch
Donald C. Rowe
William D. Smith
New York Telephone Company
d/b/a Bell Atlantic – New York
1095 Avenue of the Americas
New York, New York 10036
(212) 395-6405

James G. Pachulski
TechNet Law Group, P.C.
2121 K Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 261-3595

December 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of December 1999, I caused copies of Bell Atlantic's Opposition to AT&T's Motion for a Stay Pending Judicial Review to be served upon the parties on the attached service list either by hand (designated by *) or by facsimile and first-class mail, postage prepaid (designated by **).



Henk Brands

SERVICE LIST

Federal Communications Commission

Magalie Salas (original + 4 copies) *
Office of the Secretary
Federal Communications Commission
Room TW-B-204
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles *
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 5-C-327
445 12th Street, S.W.
Washington, D.C. 20554

AT&T

David W. Carpenter **
Mark E. Haddad
Alan C. Geolot
Peter D. Keisler
Richard C. Young
Daniel Meron
Michael J. Hunseder
C. Frederic Beckner III
Sidley & Austin
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603

Mark C. Rosenblum **
Roy E. Hoffinger
Richard H. Rubin
AT&T Corporation
295 North Maple Avenue
Basking Ridge, NJ 07920

New York Public Service Commission

Penny Rubin **
New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

U.S. Department of Justice

Donald J. Russell *
W. Robert Maguire
Matthew Magura
David F. Smutny
Frances Marshall
Luin Fitch
Ajit V. Pai
U.S. Department of Justice
Antitrust Division, City Center Building
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530

ITS

ITS *
1231 20th Street, N.W.
Washington, D.C. 20036